

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

*In the matter of an Appeal in terms of Section
754(A) of the Civil Procedure Code.*

H.R.W.M. Chulananda,
Medagoda, Amitirigigala

PETITIONER

CA 386/96 (F)

D.C. Avissawella

Case No: 878/T

VS.

1. Chairman - Mahabodhi Company,
Maligakanda Road, Colombo 10.
2. H.R.W.M. Manindra Jayasuriya (nee Somabandu)

And 17 Others.

RESPONDENTS

AND NOW BETWEEN

H.R.W.M. Chulananda,
Medagoda, Amitirigigala

PETITIONER-APPELLANT (Deceased)

- 1A. H.R.W.M. Kumari Shyamalie,
Diddeniyawatta Madagoda, Amitirigigala.

SUBSTITUTED-PETITIONER-APPELLANT

- 1B. Jayathilaka Mudiyansele Hemalatha Jayathilaka,
Diddeniyawatta, Madagoda, Amitirigigala.

SUBSTITUTED-PETITIONER-APPELLANT (Deceased)

VS.

1. Chairman – Mahabodhi Company,
Maligakanda Road, Colombo 10.
2. H.R.W.M. Mannindra Jayasuriya, (nee Semabandu),
Amithirigala South.

And 17 Others.

RESPONDENT-RESPONDENTS

20. G.W.I. Ganegoda,
“Somabandu Niwasa”, Amithirigala.
21. Vidana Pathiranage Anuradha Lakmal Gunathilaka,
“Thilaka”, Waragoda, Aththanagalla.
22. Lalith Prabash Hapangama,
No: 56/3, Dharmapala Mawatha,
Madawila, Kotte.

ADDED INTERVENIENT-RESPONDENTS

**BEFORE: M. T. MOHAMMED LAFFAR, J. &
K. K. A. V. SWARNADHIPATHI, J.**

COUNSEL: Dilini Wijesekara,
For the 1st Intervenient Petitioner.
Medha Gamage,
For the 1A Substituted-Petitioner-Appellant.
N.K. Athukorala,
For the 2nd Intervenient-Respondent.

Argument: By Written Submissions

Date of Judgment: 17.11.2021

K. K. A. V. SWARNADHIPATHI, J.

JUDGMENT

The Appellant filed case No: 386/96 in the District Court of Avissawella seeking probate for the estate of late Hapugoda Rajapaksha Wannaku Mudianselage Gunapala Somabandu.

Producing a document signed by five witnesses, the Petitioner had sought an order of probate. However, the only heir of the deceased, his daughter, opposed the document stating that the document was not an act of her late father. The District Judge, after recording issues, heard the case. On behalf of both parties, evidence was called on the 14th of June 1996. The learned District Judge pronounced the judgement and declared that the document was not an act of the deceased.

Aggrieved by this, the Petitioner appealed to this court. Both parties agreed to dispose of the matter by written submissions. Petitioner-Appellant has raised many grounds of appeal. Delay in announcing the judgement was one such ground. If that was the only reason, it is worthless discussing since delay to pronounce judgement is not a ground of appeal.

Petitioner not giving evidence is not the ground on which the petition was rejected. The Appellant had taken upon himself that was one ground where the judgement went against him. When considering the judgement, the judge had made an observation but not discussed the point at length. The learned judge had not violated Section 134 of The Evidence Ordinance. The judgement does not rely on the number of witnesses called to give evidence or the fact that the Petitioner had not given evidence.

One of the main arguments of the Appellant is that the judge had misdirected himself regarding witness Bandara giving an example as to the time Bandara was married and a visit to Nugegoda.

Witness Bandara had said he went to Nugegoda with his wife, but in reality, on the day Bandara went to Negegoda, he was not married since he was married on the day, he gave evidence he used the word 'wife'.

As to the period in which witness Bandara had a Delica van was another point which the Appellant tires stress to show that the judge had analysed evidence without due consideration when perusing the judgement and the submissions of all parties, it is not fair by the judge to pinpoint some phasers and come to a conclusion regarding the judgement.

In this case, all witnesses had given evidence for the court to identify the deceased's personality. The picture built by evidence of the person was a very positive image. The individual in question was an educated person. A schooler, a teacher, a social worker, and a politician were words witnesses used to describe him. In writing the judgement, the judge had drawn the picture of this individual while analysing the evidence. In his judicial mind, the picture of a well-educated, socially accepted individual who holds responsible positions looms up. The deceased was identified as a former director of the mortgage bank. Some well-known personalities were named as his peers. N. M. Perera, Artuhda Seveviratna are two names mentioned.

Witnesses had given evidence that those personalities with whom the deceased were acquainted were well known and held responsible positions in society. Such as teachers, Notaries, Lawyers are some to name. Why has the judge discussed all these facts? Step by step, the case is built to answer the question, will a man of this calibre get beneficiaries to sign and write his last will?

The Appellant had pointed out in the argument that Siriwardana Bandara's evidence was not given due consideration in the judgment. Siriwardana Bandara is the Son-in-Law of the petitioner-appellant. Weeks after the death of the testator, he marries the Appellant's daughter. In evidence, Siriwardana Bandaraa denied informing the Appellant regarding the will even after the death of Hapugoda Rajapaksha Wannaku Mudianselage Gunapala Somabandu.

As the learned judge had pointed out, what is the point of signing the will and keeping that fact a secret after the testator's death. His intended father-in-law, the stepbrother of the deceased, is the best person to whom the news regarding the will should be told. The very fact of trying to keep it a secret creates doubt in the judge's mind in accepting such evidence.

As a person who had a close relationship with learned people will the testator invited one of the beneficiaries to write down the will. According to the judgement, the witness called on

behalf of the Petitioner Athanayaka Mudianselage Sunil Karunasena is the person who is purported to have written the will. His father was a Labourer under the deceased. The witness was an employee at the post office who had lost his job in 1981. Will the testator, a Mortgage bank director, obtain this witness's service to write his will? Most of the five witnesses have benefited from the will, if not for all their immediate family members had benefited from the last will.

Petitioner's children, Siriwardana's wife, Gunapala's wife, signatory, Daniel's son, were beneficiaries. While analysing evidence, the judge had framed the question will a man of this calibre get the service a person who benefits from the will to sign as a witness

In law, the same test must apply to all wills, whether signed before a notary or signed by five witnesses; the test is the same. If one witness had signed the will and benefited from the will, the burden of proof is much higher than a non-beneficiary signing the document. The learned judge had looked for that proof as he had discussed all circumstances, not just some phrases to arrive at a decision. The Appellant reiterated that the exact phrases of evidence would have been in his favour if considered without the background. Considering the evidence as a whole and not phrase by phrase is pointed by the Appellant as the judge had misunderstood evidence. He failed to show where the judge had failed when considering the larger picture.

Arguments regarding the misunderstanding of a visit to a lawyer, the date of marriage of the witnesses, or when the witness was in possession of a van are trivial points compared to points the judge had considered. Appellants have failed to satisfy major issues like will a person of the calibre of the deceased will get the help of people to sign an essential document regarding which these people will have to go to courts and give evidence. If he had done a thing of this nature, would he keep it a secret from all? Including his only daughter? No evidence shows that he had a misunderstanding with his daughter, but evidence points at instances his relationship with the Petitioner-Appellant was stained. The fact that there was some time between the date of signing and the death. No other person, not even his friends in the legal profession, were informed regarding the will. This conduct of the testator had caused doubt. Specially there was evidence that the deceased had on occasions consulted a friend who was a lawyer. These were points the judge had considered in his judgement. Had the Petitioner given evidence, some doubts would have cleared. It was his duty to inform the court as to how he got the document.

When the document is not in the deceased's handwriting, the Petitioner should have given evidence to clear any suspicion. Even if the diseased got the help of Karunasena to write what he dictated until proof is provided to show that document came to the hands of the Petitioner intact, the court would hesitate to believe that the will has not been tampered with before filling in court.

Another point the judge had considered was the seal. Witness had given evidence to say that the diseased placed the signature and the seal in front of them. The seal was of Justice of the Peace. Late Somabandu was a justice of Peace appointed by the 70's government, but all those appointments have got cancelled by a gazette marked in evidence. A learned person in the calibre of the diseased knows that using a seal that indicates a justice of Peace when he is not is a fraud. Even though the learned judge had not used the word fraud, he had considered this fact. Even if all arguments are kept aside, can a document that carries fraud be accepted by the court.

Even if the judge will not consider who N.M. Perera or Athauda Senevirathna or other people names are mentioned in evidence as learned people. Fraud cannot be allowed in court. Using the seal of a Justice of the Peace when he is not one is fraud. On this ground alone, the purported should get rejected.

I hold that the Appellant had failed to prove essential points discussed in the judgement to be in error. Therefore, while upholding the judgement, I dismiss this appeal with cost and pronounce the purported will not be an act of the diseased on the strength of the seal, which amounts to fraud.

I order the register to communicate the judgement of this court to the District Court of Avissawella and to remit the case record.

Judge of the Court of Appeal

M. T. MOHAMMED LAFFAR, J

I agree.

Judge of the Court of Appeal